Gold Bond Building Products, a Division of National Gypsum Company *and* Association of Western Pulp and Paper Workers, Local 320, AFL–CIO. Case 32–CA–9974

April 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On October 10, 1990, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed limited exceptions and a brief, and each party filed an answering brief to the other's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Gold Bond Building Products, a Division of National Gypsum Company, Stockton, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel, noting that the Respondent has sold the facility involved herein, requests that the remedy be modified to require that the Respondent be liable for backpay until the discriminatee Salvador Salas secures substantially equivalent employment with another employer.

As recommended by the judge, we leave to the compliance stage of this proceeding the determination of whether the purchaser of the Respondent's facility is a ''successor'' with an obligation to remedy the Respondent's unfair labor practices. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). If it is determined that the purchaser of the Respondent's facility is a ''successor'' obligated to comply with the reinstatement order, the unlawful conduct will be remedied and the discriminatee reinstated. If the purchaser, however, is not a successor with an obligation to reinstate Salas, but nevertheless hired employees of Respondent who were working at the time of sale, then the Respondent's discrimination is likely to have had the effect of frustrating Salas' chance of employment with the purchaser. In that event, we find that Respondent would be liable for backpay until Salas obtains substantially equivalent employment to that which he had when he was employed by Respondent. See *Fairview Nursing Home*, 202 NLRB 318 (1973).

Gary Connaughton, for the General Counsel.

Dennis C. Merriam, of Charlotte, North Carolina, for the Respondent.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. An original and a first-amended unfair labor practice change in the above-captioned matter were filed by Association of Western Pulp and Paper Workers, Local 320, AFL–CIO (the Union) on October 28 and November 7, 1988,[1] respectively. Based on these filings, on January 11, 1989, the Regional Director for Region 3 of the National Labor Relations Board (the Board) issued a complaint, alleging that Gold Bond Building Products, a Division of National Gypsum Company (the Respondent) had engaged in acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent timely filed an answer denying the commission of any alleged unfair labor practices. Pursuant to a notice of hearing, a trial was scheduled for and held on January 17 and 18, 1990, before me in Stockton, California. At the trial, all parties were afforded the opportunity to examine and cross-examine witnesses, to offer into the record any relevant evidence, to argue their respective legal positions orally, and to file posthearing briefs. Both counsel for the General Counsel and counsel for Respondent filed such briefs, and they have been carefully read by me. Accordingly, based on the entire record, including the posthearing briefs and my observation of the testimonial demeanor of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a State of Delaware corporation, maintained an office and place of business located in Stockton, California, at which it was engaged in the manufacture and distribution of building products. During the 12-month period immediately preceding the issuance of the instant complaint, in the normal course and conduct of its above-described business operations, Respondent purchased and received goods and products, valued in excess of $50,000, directly from suppliers who were located outside the State of California. Respondent admits that it is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

[1] Unless otherwise stated, all events occurred during calendar year 1988.

III. ISSUES

The complaint alleges that Respondent. terminated its employees Salvador Salas, Isaac Arista, and Mohammed Khan in violation of Section 8(a)(1) and (3) of the Act because they participated in a concerted work stoppage and strike against it from October 22 through 27, 1988. Denying the commission of any unfair labor practices, Respondent contends that Salas was terminated for ''walking off'' the job and that Arista and Khan were terminated for having engaged in serious acts of misconduct during the aforementioned strike.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The record establishes that, until it sold the facility to the Newark Sierra Company in August 1989, Respondent maintained a plant in Stockton, California; that Michael Rogge was Respondent's plant manager and was responsible for all the functions of the plant including production, personnel, accounting, purchasing, sales, service, and distribution; and that Sam Franco was the personnel and safety supervisor. The record further establishes that the Union represented Respondent's production and maintenance employees; that the most recent collective-bargaining agreement between Respondent and the Union expired in September 1988; that the parties had negotiated on a successor agreement since August; that, on October 21, Respondent presented to the Union its ''last, best, and final offer''; that the Union rejected the final offer; and that Respondent's bargaining unit employees began a concerted work stoppage at the Stockton plant on October 22. During the strike, there was picketing in front of the entrances to the facility; ingress and egress of vehicles to and from the plant was occasionally impeded; there were threats of violence, some property damage (mainly for vehicles), and eggs were thrown at anyone entering the plant premises and toward the guard shack, located to the west of the plant's loading dock and beside an entrance onto the facility; and, on October 26, striking employees and others unleashed a barrage of rocks, bottles, eggs, and steel ball-bearings aimed at the guard shack and the loading dock area of the plant. The strike ended on October 27 after, on behalf of the striking employees, the Union made an unconditional offer to return to work. There is no dispute that the Union's offer was accepted and striking employees were permitted to return to work commencing with the day shift on October 28.

1. Isaac Arista and Mohammed Khan

Isaac Arista and Mohammed Khan were employed by Respondent at the time the above strike began (Arista had been employed since 1985 and Khan since June 22, 1988); both engaged in the work stoppage and participated in the strike by picketing; and both were terminated at the conclusion of the strike for having assertedly engaged in ''picketline misconduct,'' participating in the rock throwing attack on the plant property on October 26. In this regard, the record reveals that, during the afternoon on said date, approximately 140 striking employees and supporters gathered in the area of a union trailer, which had been parked in a parking lot, located adjacent to the Happy Valley Inn, a bar in which employees often ate lunch, and directly across Church Street from the plant, for a speech by a union official. By 4 p.m., no more than 80 to 90 individuals, who were congregated either between the union trailer and the Happy Valley Inn or in a covered shed area toward the rear of the parking lot, remained. Suddenly, according to Jackie Shaw, who works for Burns Security as a security guard and was assigned to work at Respondent's Stockton plant during October 1988 and whose duty post was the guard shack, sometime between 4 and 4:30 p.m., the aforementioned barrage of rocks, bottles, eggs, and steel ball-bearings came from where the strikers and their supporters were congregated, striking the guard shack and plant loading dock area. Patrick Kee, the director of security operations for Nuchols & Associates Security, Inc., a company utilized by Respondent for the providing of security guards during the strike, and supervisor of the Nuchols & Associates security guards who were assigned to Respondent's plant, testified that he was inside the guard shack at 4:15 p.m. at which time the rocks and other objects began raining down on the plant premises from across the street. Looking through the shack's curved front window, which was protected by an inch-thick ''bullet proof plexiglass'' covering, installed at the outset of the work stoppage, Kee was able to observe ''approximately 12'' individuals, who ''were pretty much grouped together'' and standing ''closer to the Happy Valley Inn'' than the other remaining strikers and their supporters, who were clustered around the Union's trailer or in the shed area, heaving the aforementioned objects toward the plant property.[2] In all, Kee recognized four of the miscreants as striking employees and stated that he knew the names of two. Isaac Arista and Mohammed Khan,[3] and that both were throwing rocks with regard to exactly what he observed the two alleged discriminatees doing, Kee testified on direct examination, ''I seen the rocks in their hand. I seen them actually bend down, pick something up off the ground, and then they threw it and when it left their hand it was rocks . . . . heading in the direction of the loading dock area,'' at which trucks and trailers were parked. He added that he was certain he saw Arista and Khan throwing rocks, 2 to 3 inches in diameter; that their throwing motions were similar to those of baseball outfielders making long throws to the infield; and that each discriminatee threw three or four rocks. During cross-examination, Kee contradicted himself as to actually observing objects in the hands of Arista and Khan—''I seen them bend down and their hand goes down and covers something. . . . I cannot see what their hand is covering.'' However, he was certain that what each threw in the direction of the plant were rocks (''I seen the rock as it was airborne.''). Kee further testified that the barrage of rocks, bottles, eggs, and steel ball-bearings continued for ''between 30 and 60 minutes''; that, immediately after it stopped, Franco came out to the guard shack; and that he (Kee) told Franco what he had just observed and ''who

[2] Kee testified that he was ''between 100 and 150 feet'' from the group of 12 individuals.

[3] Kee stated that he recognized Arista and Khan from their picketing and that Sam Franco had identified them to him. Franco corroborated Kee on this point, stating that he had, pointed out both men to Kee earlier during the strike.

it was that I had observed,'' specifying Arista and Khan ''throwing rocks.''[4]

Sam Franco testified that, on the afternoon of October 26, he was called back to the plant by the security guards, who reported that there was an ongoing rock and bottle throwing incident. On arriving at the plant, Patrick Kee gave him the names of some of the individuals who had been involved, including Arista and Khan. Thereafter, according to Franco, he reported to Michael Rogge as to what Kee had told him, and, based ''on the testimony of Pat Kee being an eyewitness, they decided.'' to terminate both Khan and Arista for having engaged in picket line misconduct. Rogge corroborated Franco that they ''discussed the overall circumstances of what [the incident] had involved'' and, after again speaking to the eyewitness, decided to terminate the two alleged discriminatees.

Both Isaac Arista and Mohammed Khan denied having engaged in any rock throwing on October 6. With regard to the former, employee Dar Moreno, who was a picket captain during the strike and was present each day during the work stoppage either on the picket line or across the street from the plant, testified that he is acquainted with Arista; that Arista was among those gathered in the area of the Union's trailer in the parking lot adjacent to the Happy Valley Inn during the afternoon on the above date; that, as was his custom during the strike, Arista left the area ''between three-thirty and four'' o'clock in order to pick up his wife and children; that the rock throwing[5] occurred between 4:30 and 5 p.m.; and that Arista did not return to the plant area until approximately 6 p.m. Contrary to Moreno's recollection, Arista himself testified that, during the work stoppage, he customarily remained in the plant vicinity until ''4:30 in the evening'' at which time he departed to pick up his wife at a ''cosmetology school'' and his children who were with a baby-sitter; that, specifically as to October 26, he left the picket line at ''between four and four-thirty'' in the afternoon;[6] and that he observed the throwing of eggs, rocks, and firecrackers before he left. While maintaining that he was not involved, Arista stated that as many as 15 employees were throwing debris toward the plant from across the street and that they were all standing between the bar and the Union's trailer.[7]

Mohammed Khan testified that he was across the street from the plant during the afternoon on October 26 ''to hear the speech''; that he was there for no longer than 2 hours; that ''when the speech was ended I went home'' along with many others; that he saw no one throwing anything at the plant; and that he did not throw anything. In any event, Khan, who is right-handed, asserted he could not have thrown rocks that afternoon as he had an injured right arm, resulting from having been struck by a truck while picketing on October 24.[8] According to Khan, the injury occurred as he was picketing at a plant entrance during the evening that day; a ''pick-up'' truck, driven by a man who was meeting his wife, an office employee. came through the gate and struck him. Khan added that he was turning away from the on-coming car, with his back facing the vehicle, when he was hit by the driver's side of the vehicle—the point of impact being the back of his right shoulder, and he was ''shaken'' by the impact but, contrary to his pretrial affidavit, did not fall down. Immediately after the collision, the pickup truck accelerated and ''went inside very fast.'' Khan further testified that, as a result of being struck by the truck, he was in great pain, immediately went home, and ''took medicine for the pain.'' He added that the pain persisted for 2 or 3 days, during which time, in order not to irritate the injury, he neither tried to raise his right arm above his head nor lifted anything with it.[9]

Although testifying that the security guards at that entrance denied recording the incident, Khan stated that Respondent had two video tape cameras operating at the plant entrance at the time of the collision. In this regard, Respondent offered into the record two video tapes, Respondent's Exhibits 7 and 8, dated October 23, which purportedly depict the above-described incident.[10] Analysis of the scenes, which appear on both tapes and which were jointly viewed by opposing counsel and me during the trial, reveals that, at approximately 6:53 p.m., a pickup truck approached the plant entrance, slowing down as it entered the driveway, and moved toward a security guard and several pickets, who were standing in front of and alongside the vehicle. The alleged discriminatee Khan was among the pickets and standing next to and facing the right front fender of the truck (the passenger side). While slowing the truck, the driver, who, according to Sam Franco, was the husband of an office employee, never actually stopped; the pickets, including Khan, moved out of the vehicle's path in order to avoid being struck; and the driver accelerated as the pickup truck moved past the strikers. With regard to Khan, who carried a placard

[4] Respondent had assigned to the security guards the task of video taping the picketing and all surrounding activities. However, there were no tapes of the October 26 incident. According to Kee, the guards did have their video-taping cameras available but taping was impossible as the strikers were using large mirrors to reflect sunlight toward the cameras and, thereby, ruining the resulting tapes. Arista continued this.

[5] Moreno testified that not only rocks but also eggs and bottles were thrown ''from the Happy Valley parking lot'' toward the plant by perhaps ''a dozen individuals, who ''were mixed . . . in with the other people.'' Stating that the rock throwers were striking employees, Moreno added that not all of the 12 were employees, that the rocks were actually thrown by hand but that the eggs were propelled by means of slingshots.

[6] In his pretrial affidavit, Arista stated that, on October 26, he departed the plant area at 3 p.m. in order to pick up his wife. Explaining why he changed his departure time to sometime between 4 and 4:30 p.m. while testifying, Arista averred ''before that's the time I usually picked her up.''

[7] Arista stated that he was across the street from the plant during the afternoon on October 6 but that he never remained in one place . . . I was just around.'' He added that he was ''under the shed for the meeting''; that he was near the union trailer at other times; and that, for a while, he was ''inside the bar.''

[8] After answering ''correct'' to a question as to whether he had been struck by a pickup truck on the night of October 24, Khan was confronted by his pretrial affidavit in which he stated that he could not have thrown rocks on October 26 because 4 days before, on the night of October 22, he was ''knocked down'' by a pickup truck.

[9] Other than taking some pain medication, Khan received no medical treatment for his injury. Thus, he did not see a doctor, nor did he take any prescription medicine or keep his arm in any type of sling. Also, Khan denied engaging in any picketing subsequent to the injury. Although stating that Khan told him that his arm was ''pretty sore,'' Dan Moreno could not say Khan was *not* one of the rock throwers but only that he did not see him throwing anything.

[10] The time and date on the video tapes was October 23 at 6:53 p.m. Counsel for the General Counsel and counsel for Respondent were afforded the opportunity, subsequent to the close of the hearing, to view Respondent's video tapes of the picketing for October 2 through 24 and stipulated that no other tapes revealed any incident such as described, infra.

With regard to the date on the tapes, Sam Franco testified that, once a tape is recorded, the time and date are imprinted on it, and ''you could not change it.''

in his right hand, the right side of the truck passed close by him and, while it is unclear whether there was actual contact, Khan evidenced no indication of having been struck or injured by the vehicle as it passed by him.[11]

In addition to the above video tapes, Respondent offered into the record another tape, Respondent's Exhibit 9, dated October 24. On tape is depicted an incident, jointly viewed by opposing counsel and me during the trial, occurring at 8:06 a.m., the morning after Khan's asserted injury, in which the alleged discriminatee is shown with his right arm fully extended above his head, making a waving motion. Another scene on the tape, which was jointly viewed by opposing counsel and me, shows Khan, at approximately 10:23 a.m., carrying a picket sign, with his right arm extended straight out. Finally, another video tape, dated October 26, was viewed by opposing counsel and me; on it is depicted a scene, at 2:36 p.m., of Khan, standing in front of the plant and holding up a tee-shirt, with the word ''war'' printed on it. In doing so, Khan held the shirt above his head, with both arms upraised. In none of these three scenes does the alleged discriminatee appear to be in any pain or discomfort as a result of using his right arm.

Casting doubt on Patrick Kee's ability to identify Khan and Arista as rock throwers and, inferentially, his credibility, counsel for the General Counsel called Jackie Shaw as a rebuttal witness. Shaw, the Burns security guard, testified that she had been assigned to duty at Respondent's plant for 4 years, that her duty post was normally the guard shack at the entrance to the plant or Church Street, and that she arrived, on duty, at approximately 3:50 p.m. on October 26. With regard to being able to identify anyone in the area of the Union's trailer, parked across the street, noting that cars were parked all along the opposite side of Church Street and in the driveway alongside the Happy Valley Inn, at 4 p.m. that afternoon,[12] she stated that from inside the guard shack, she could see ''heads'' but no more of peoples' bodies. Asked if she could identify any of the individuals in the proximity of the trailer, Shaw responded, ''If I could have seen clearly, you could have. But they were all bunched together. They were just like a bunch of ants on a piece of candy. They were all bunched together.''[13] Compounding the difficulty in observing anything across the street from inside the guard shack, continued Shaw, was the condition of the protective covering for the front window—''[The strikers] had thrown eggs. We had eggs on the window with the yolks coming down and stuff. The window was a mess.'' As a result, she testified, ''it would make things blurry . . . you couldn't see as good as you could if they wasn't there.'' Next, specifically asked if you could see anyone in the area between the trailer and the bar bending over in order to pick something up from the ground, Shaw answered, ''No sir.'' Finally, with regard to Kee's presence in the guard shack at the outset of the rock barrage, Shaw said, ''when those rocks started there was nobody in there with me. I was by myself. . . . [Kee] came in later . . . . a couple of minutes later,''[14] and he stood by the front window. Asked if he could have identified particular individuals, she stated that Kee was much closer to the window than herself, ''but I really don't see how he could . . . pinpoint [anyone] because . . . the plexiglass with the eggs and the stuff on it, it was really hard.'' Kee himself conceded that there were smashed eggs and rock scratches on the plexiglass covering but denied that such distorted his view of the area that afternoon.

2. Salvador Salas

The record establishes that, subsequent to the conclusion of the work stoppage and to accepting the striking employees' unconditional offer to return to work, Respondent resumed normal operations at the Stockton facility on October 28—albeit with a skeleton crew of just 35 to 40 workers. According to the plant manager, Michael Rogge, Respondent was ''concerned about sabotage'' and, as a result, assigned approximately 70 individuals (including 20 uniformed security guards and 50 supervisors and salaried employees from other plants, owned by Respondent) to watch all workers and all areas of the plant that morning. One of the workers who reported to the plant for that day's morning shift was alleged discriminatee, Salvador Salas. Salas, who had been employed by Respondent since 1976, was a boiler operator[15] in the plant's powerhouse. At the time of the work stoppage, he had been the Union's shop steward in his department and, during the strike, served as a picket captain. Along with the other powerhouse employees,[16] Salas reported for work at 7 a.m. and, according to him, a uniformed security guard was ''physically brought to me by my supervisor [Malcolm Messer] and it was stated that he is the one that is going to be watching me.''[17]

With the guard watching him, the alleged discriminatee worked until 8:30 a.m. at which time he was approached by Messer in the boiler room. In the presence of senior engineer, Reuben Moreno, testified Salas, Messer told him he had been ''instructed'' to have Salas report to Foreman Merle Davidson for work in the labor pool in the shipping department. Salas asked if Messer was taking him off his regular job and placing him in the labor pool, and Messer answered yes. To this, Salas asked Messer to verify the time

[11] Given his position at the right side fender as it passed by him, what was clear from viewing both tapes is that it was impossible for Khan to have been struck on the back of his right shoulder by the pickup truck as it passed by him.

[12] Dan Moreno corroborated Shaw on the presence of cars—''there was cars parked all over . . . . in the driveway, in the parking lot, along the whole side of the bar'' and along Church Street from the Happy Valley Inn to the trailer.

[13] Shaw said that she did look across the street after the initial rock barrage; the strikers ''were all together. . . . they were bunched up. The were just all there together.'' She could identify no particular individuals throwing rocks.

[14] Shaw admitted that her duties did not include handling strike activity, which was assigned to the Nuchols' crew and that Kee entered the guard shack just as the rock barrage ended. She further stated that Kee asked if she recognized any of the rock throwers. After Shaw said that she could not, Kee responded that he had seen ''people throwing rocks.''

[15] Apparently, such employees are also known as firemen.

[16] Comprising the small crew in the powerhouse that morning were Malcolm Messer, the foreman; Reuben Moreno, the senior engineer (in charge of powerplant maintenance); Gill Zellner, the turbine engineer; himself; and Steve Melera, the utility man.

[17] Contradicting Salas, Messer testified that there were security people in the powerhouse that morning but not stationed there. Rather, they would walk through on their rounds and leave. After being confronted with Salas' testimony, Messer stated that ''they had one upstairs . . . who stayed there but none down there where Salas was.''

Reuben Moreno, the senior engineer, corroborated Salas and contradicted Messer, testifying that not only were guards posted throughout the powerhouse, including the boiler room, where Salas worked but also a guard ''followed me everywhere I went.'' After first denying that a guard followed Moreno that day and after being told that Moreno had so testified, Messer changed his testimony, stating ''It could have happened. Yes.''

of the assignment because the labor pool employees received a break at 9 a.m., ''so therefore I take a break at nine o'clock.''

With regard to the assignment of the alleged discriminatee to the labor pool, Malcolm Messer testified that, earlier, he had been summoned to the main office where Mike Rogge ''called me over and asked me to have Sal Salas report to Merle Davidson to sweep up the parking lot.'' Thereupon, according to Messer, he returned to the powerhouse and so instructed Salas. Plant Manager Rogge testified that he arrived at the plant on October 28 and noticed that ''there was an awful lot of broken glass and rocks'' and other debris ''all over the ground'' in the loading dock area. Believing the conditions there to be ''dangerous'' and in need of immediate cleaning, Rogge testified that he originally contacted the maintenance department but was informed that the only available worker[18] ''went home sick.'' Just then, ''Mac Messer . . . walked past the door so I yelled at him if he could send Sal Salas out to clean it . . . I guess . . . I asked if he could spare him.''[19] Finally, on this point, Merle Davidson, who is Respondent's distribution supervisor and responsible for the shipping department, testified that the ''yard was full of rocks and broken beer bottles,'' that he had employees who were available to perform the required sweeping duties,[20] that he did not request anyone be assigned to his department to do the above work, and that neither Rogge nor Franco customarily assign work in his department without his knowledge.

In any event, having been assigned to report to Davidson and with the security guard, who had earlier been assigned to him, following him, Salas reported to the shipping department and spoke to Davidson. Salas testified that the foreman began, saying ''I don's know what you did, Sal, but you got a shitty job. I said, what do you mean. He says, well, you're going to be assigned to be sweeping out the loading dock and the blacktop.'' Salas replied ''okay'' and asked what time the shipping department employees had lunch. Davidson replied, ''between 11:45 and noon and I made a gesture which he questioned and I says . . . because I go to lunch at 11 o'clock, I am accustomed to eating at 11 o'clock.''[21] To this, Davidson said ''Okay, go ahead and go on lunch at 11 o'clock.''[22] Davidson, who stated that he learned Salas would be assigned to his department earlier in the morning when ''I was told by Mr. Franco or Mike Rogge that Mr. Salas would be sent to the shipping department and I was to . . . assign him . . . [to] sweeping debris in the front shipping yard,'' testified that Salas reported to his office between 9 and 10 a.m., identified himself, and said, ''I'm here to sweep up the front yard.'' Davidson was unable to recall anything else about this conversation but specifically denied having any conversation about the time of Salas' lunchbreak or saying that he had been assigned to a ''shitty job.''[23]

Salas and Davidson concluded their conversation in the shipping department office, and the foreman accompanied Salas to the loading dock area, showed him the location of the broom and shovel, told him to bring a scrap bin to the debris-covered area, and instructed Salas to ''sweep it up.'' As ordered, Salas began sweeping and cleaning the loading dock area, removing the rocks and broken glass. There is no dispute that, at approximately 11:05 that morning, Salas stopped working, left the plant property, and went across the street to the Happy Valley Inn. According to Salas, he went to have his lunch[24] after so informing the uniformed guard, who had accompanied him from the powerhouse and after, in Davidson's estimation, completing almost all the sweeping work, with just ''one small pile left to be picked up.'' Moments after the alleged discriminatee left, Davidson returned to the loading dock and observed the security guard, but not Salas, there. Informed by the former that ''Salas had left the job and gone across the street'' to the bar, Davidson walked back to his office, telephoned Malcolm Messer, who said that Salas did not receive a regular lunchbreak in the powerhouse, and then telephoned Michael Rogge with the news of Salas' conduct. Rogge, who, according to Davidson, said he would take care of the matter, testified that, after the call from Davidson, he walked to the latter's office; was told by the foreman that the information had come from the guard, who was assigned to watch Salas and who, according to Davidson and Franco, was a supervisor from another plant; and spoke to the guard who said that Salas had, indeed, left the job and had gone across the street to the bar. Thereupon, Rogge re-

[18] Asked if, in fact, he specifically asked for Bill DeSersa, an employee, who was known to him as being a union official, the plant manager averred that he was not sure. However, in his pretrial affidavit, Rogge admitted specifically asking for Desersa.

Sam Franco testified that Rogge, indeed, attempted to assign DeSersa to the work prior to assigning the sweeping to Salas and that DeSersa, in October 1988, was a member of the Union's negotiating committee and a millwright, a ''skilled'' position.

[19] According to Rogge, he asked for Salas because ''we were running a real skeleton crew. We were only running one machine, except for the one machine and the powerhouse, and maintenance, there wasn't anyone else to speak of in the plant from an hourly standpoint. . . . I figured was the other best bet and Sal was the junior man in the powerhouse. . . . He would be the logical one to go out.'' As to whether he new that Salas was a union steward, Rogge said, no. He explained that he was aware that Salas had been a steward ''some of the time'' but not ''all of the time'' and that he had attempted, without success, to obtain a list of shop stewards from the Union. Casting doubt on Rogge's testimony as the uncontroverted testimony of Salas that he had personally filed, as shop steward, no less than 25 employee grievances and that he had signed each one.

Rogge admitted being aware that there were no surplus workers in the powerhouse that morning and that someone had to be taken from his regular work to perform Salas' job there.

[20] Contradicting Davidson, Rogge testified, ''I don't think he had any janitors'' to do the work that morning.

[21] Other than the senior engineer and the utility employees, workers in the powerhouse received no regularly scheduled lunchbreak. Employees, such as Salas and the other firemen, were expected to eat their lunches whenever time permitted; however, the parties stipulated that the practice of the day-shift employees was to eat lunch at approximately 11 a.m. The senior engineer and the utility people had a lunchbreak built into their daily shift schedules as did all other plant employees. According to Salas, the utility personnel in the powerhouse had their lunchbreak at 11 a.m. Also, whenever he substituted for utility people, he ate at the time the employees had their lunchbreak.

[22] Davidson testified that, ''normally, if I have extra people working in my department, they take their lunch at the same time the shipping people take their lunch.'' This appears to represent Respondent's policy when employees are temporarily transferred from their departments to others. Thus, Malcolm Messer corroborated him on this point, saying when people substitute for utility workers in the powerhouse, they are ''supposed to'' take their lunches at the same time as other utility workers.

[23] Davidson denied that Salas ever asked what time the shipping department employees ate lunch but changed his testimony, saying ''its possible'' that he did say the sweeping job was ''a shitty'' one. On this, he averred, it ''was not a job that most people would relish doing.''

[24] As stated above, employees often ate lunch at the Happy Valley Inn. There is no restriction against employees, other than those in the powerhouse, leaving the plant property during their scheduled lunchbreaks, and supervisory permission is not required.

turned to his office, told Franco what had occurred, and telephoned Respondent's attorney. The latter told Rogge that employees had been terminated for walking off the job (Rogge was aware that probationary employees had been discharged for such conduct) and instructed him to get Salas' explanation for his conduct. Thereupon, Rogge telephoned Davidson and was told that the latter had spoken to Messer and knew that Salas' hours had not been changed nor had they discussed lunch. According to Rogge, as a result of what occurred, ''we really didn't think . . . he was going to come back.''

Meanwhile, Salas completed his lunch, returned to the plant property at 11:27 a.m., and resumed performing the sweeping duties to which he had been assigned. Shortly afterward, he was approached by three security guards who said he was wanted in the plant manager's office. Salas refused to recognize their authority to order him to go anywhere, an argument ensued, and one guard telephoned Rogge that Salas would not come to his office unless ordered to do so by Rogge himself. The latter instructed Sam Franco to bring Salas to his office; Franco, thereupon, spoke to Salas; and the alleged discriminatee accompanied Franco to Rogge's office where a meeting ensued. Salas testified that Rogge began, saying ''I'm sorry but I'm going to have to terminate you.'' Salas asked why, and Rogge asked if Salas wanted a union steward present. Salas said he saw no reason for one and again asked why he was being fired. Rogge replied ''that I walked off the job . . . Mr. Davidson had called him and told him that I had walked off at 11 o'clock.'' Salas responded that Rogge should ask Davidson about their earlier conversation as to his lunch hour but Rogge replied, ''I don't have to do that, you're terminated, we won't tolerate you walking off the job.'' No more was said, and Salas left.

Michael Rogge testified that Salas was ''extremely hot and worked up, belligerent'' and yelling that he was being harassed when he was ushered into the plant manager's office. Rogge asked if Salas wanted a union steward or was one himself, and Salas said, no. Thereupon, ''I asked Sal why he had walked off the job and he said that he was hungry and he just went to the bar . . . I asked him if he had received permission from anybody or told anybody . . . that he was leaving, or that he was going to go to lunch and he said, no.'' Rogge then asked ''if had any other reasons . . . as far as why he walked off the job . . . . and he said no, and I said I'll be forced to terminate you.'' During cross-examination, Rogge changed his testimony, conceding that, as he stated in a pretrial affidavit, Salas never yelled nor uttered any sort of belligerent comment but exhibited this attitude by his ''body language'' and ''demeanor.'' Further, he admitted that Salas said that he had gone to the bar because he was ''hungry''—''it could have been lunch.'' During direct examination, Sam Franco testified that, when Salas entered Rogge's office, the latter asked if he wanted a union steward, and Salas said, no. Salas asked by he was there; ignoring the question, Rogge ''asked him why did he walk off the job. [Salas] said that he went across the street to get something to eat.'' Rogge responded that walking off the job was a serious ''offense'' and asked if Salas had anything to say about it and whether he had received permission. Salas replied that he did not need permission. Thereupon, Rogge said he was forced to terminate him, and Salas asked for a final check. During cross-examination, Franco denied that Salas said he was a shop steward in answer to Rogge's question but was confronted with his sworn testimony to the State of California Unemployment Appeals Board that Salas, indeed, said he was a shop steward. Further, while he said he could not recall Salas explaining to Rogge why he took his lunchbreak then, Franco's sworn testimony to the Unemployment Appeals Board was that, after Rogge said he did not have a lunchbreak, Salas said ''well I do as long as I'm working in a labor pool.'' When Rogge then asked whether he had ever asked what time he was to take lunch, Salas said, no, adding ''this is when I go to lunch during a labor pool job. I take a lunch at 11 o'clock.''

The record reveals that this was the first instance that Respondent had temporarily taken a skilled employee off his regular job and assigned him to a labor pool job. Further, according to Malcolm Messer, taking Salas from the powerhouse required that he utilize Reuben Moreno as the fireman on the day shift. Although Moreno had some experience in that capacity, Messer conceded it was ''unusual'' to have Moreno perform Salas' work. Finally, Messer stated that ''janitors'' are usually the employees who perform sweeping duties and that the employees were supervised by Davidson.

With regard to the decision to terminate Salas, Sam Franco testified that when Messer told them that Salas had no lunch hour, he and Rogge believed the alleged discriminatee had walked off the job inasmuch as ''nobody in the plant had a lunch at 11 o'clock.'' When informed that such was the customary time for the powerplant workers to eat their lunches, Franco averred, ''I did not know that at the time.'' In light of the testimony as to what Salas told Rogge he did when he left the plant, Franco conceded that the dispute seemed to be over the time Salas should have taken his lunch and not over walking off the job; however, he pointed out that such was only what Salas told them and it may have been a fabrication. In any event, Rogge just blurted out that Salas was fired—without prior deliberation or consultation. Michael Rogge testified that Salas should have requested permission prior to leaving the plant especially when he was taking a different lunch hour than he would normally have taken.[25] Finally, Rogge admitted that no long-time employee had ever previously been terminated for walking off the job.

B. *Analysis*

1. Arista and Khan

''Section 7 of the Act gives employees the right to peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'' *Clear Pine Moulding*, 268 NLRB 1044, 1045 (1984). However, ''striking employees may disqualify themselves from reinstatement by engaging in serious misconduct.'' *Matlock Truck Body Corp*., 248 NLRB 461, 472 (1980). In all cases involving either the discharge of or the refusal to reinstate strikers for having engaged in such alleged acts of misconduct while picketing, ''the burden of proving discrimination is that of the General Counsel.'' *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1952). In this regard, the General Counsel must first establish that an individ-

[25] Rogge conceded that permission is not normally required from a supervisor for employees to leave during their regular lunch hour.

ual was, in fact, a striker and that his employer took some action against him for conduct while the employee engaged in the work stoppage. At this point, the burden shifts to the respondent which must prove that it entertained an honest belief that the striking individual has engaged in misconduct. Such constitutes an adequate defense to a charge that the discharge or refusal to reinstate was violative of the Act except where the General Counsel next affirmatively establishes that the employee did not, in fact, engage in the asserted misconduct or that it was not so flagrant or egregious so as to warrant discharge or denial of reinstatement. *Gem Urethane Corp*., 284 NLRB 1349, 1352 (1987); *Desert Inn Country Club*, 275 NLRB 790, 795 (1985); *Newport News Shipbuilding*, 265 NLRB 716 (1982). Finally, in determining whether a striking employee's picket line misconduct is sufficiently serious to justify an employer's refusal to reinstate him, the Board applies an objective test: ''whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'' *Clear Pine Mouldings*, supra at 1046.

Here the record establishes—and Respondent concedes—that employees Arista and Khan participated in the concerted work stoppage and picketing against it at the Stockton plant, which activities commenced on October 22, 1988. Further, there is equally no dispute that Respondent refused to reinstate each alleged discriminatee for certain strike-related misconduct, Arista's and Khan's involvement in which is in dispute. The burden, I believe, thereby shifted to Respondent to establish that it honestly believed both alleged discriminatees engaged in the misconduct assertedly for which they were denied reinstatement on the conclusion of the strike—participation in the rock-throwing attack on the plant property between 4 and 4:30 p.m. on October 26. In this regard, I rely on the uncontroverted testimony of Sam Franco, finding that Plant Manager Michael Rogge and he decided to deny reinstatement to Arista and Khan, honestly believing that the two employees had, indeed, participated in the above-described rock-throwing barrage. I further find that their conclusions were based on the purported ''eye witness'' reports of Patrick Kee, the Nuchols, Inc. official who supervised the security guards at the plant during the strike, concerning the rock throwing on October 26. The Board has long held that an employer may premise his belief of striker misconduct on reports of its security guards. *Newport News Shipbuilding*, supra; *Giddings & Lewis, Inc*., 240 NLRB 441, 447–448 (1979).

As recognized by the parties, the crux of the instant matter is whether, in fact, Mohammed Khan and Isaac Arista engaged in the attributed misconduct. Put another way, do I credit the ''eye witness testimony of Patrick Kee, or do I credit the specific denials of the alleged discriminatees as to their participation in the October 26 rock throwing. In order to resolve this quandary, I must assess the credibility of the several witnesses, and, in this regard, the most impressive was the security guard, Jackie Shaw. Her testimonial demeanor appeared to be that of an honest witness, and she had no interest in the outcome of this proceeding. Accordingly, her testimony shall be credited in its entirety and relied on by me in determining what occurred. As to the alleged discriminatees, not only was Khan's demeanor, while testifying, suggestive of a witness utterly lacking in candor but also his assertion that an injury to his right shoulder prevented him from engaging in any of the ascribed rock throwing was rendered absolutely untenable by the video tape evidence of the incident, which supposedly resulted in the damage to his shoulder, and his subsequent actions during the strike.[26] Unlike Khan, Arista impressed me as being an apparently trustworthy witness; however, based on the blatant contradiction between his trial testimony and his pretrial affidavit regarding the time of his departure from the plant area in the afternoon of October 26, one might reasonably conclude that he may have deliberately misled the General Counsel as to the impossibility of his participation in the rock throwing and that he would dissemble when such represented a means to a desired end. While employee Dan Moreno had no pecuniary interest in the outcome of this matter and while his employment with Respondent continued after the strike, his demeanor, while testifying, seemed to be that of a witness who is merely attempting to buttress the position of his side rather than honestly recounting the events at issue. In particular, I found rather troubling and inexplicable (except as fabrication) his corroboration of Arista's pretrial affidavit statement, which the alleged discriminatee contradicted at the hearing, regarding the time that he (Arista) departed from the scene of the picketing—approximately an hour before the rock throwing began, and of Khan's disingenuous assertion of a shoulder injury. Finally, while not demonstrating the mendacity of Mohammed Khan, Patrick Kee did not exhibit the demeanor of an entirely candid and truthful witness. Accordingly, noting a glaring contradiction[27] in his trial testimony as to what he was able to observe that afternoon and the singularly more impressive testimony of Jackie Shaw, I harbor doubts as to the ability of Kee to have observed what he claimed and to his veracity, as well.

Based on the foregoing credibility analysis and the record as a whole, while it cannot be stated with any degree of certainty that either Mohammed Khan or Isaac Arista actually participated in the October 6 rock throwing, one may justifiably conclude that counsel for the General Counsel has failed to establish that each, in fact, did not. In these regards, at the outset, I place no reliance on the supposed ''eyewitness'' testimony of Patrick Kee, believing that it would have been virtually impossible for him to have identified anyone cross the street that afternoon and that, therefore, he fabricated his testimony with regard to what he saw. Thus, according to the candid testimony of Jackie Shaw, when the rock barrage began, Kee was not even inside the guard shed and that when he did enter and looked out the front window, the rock throwing had almost entirely petered out. Further, the window was covered with dry splattered egg whites and yolks,

[26] Viewing the video tapes of the incident which supposedly resulted in the injury to his right shoulder leads one to the unmistakable conclusion that, if Khan did, in fact, hurt his shoulder, this incident did not cause the damage and that, since the incident, which appears on Respondent's video tapes dated October 3, must have been that which was described by Khan inasmuch as no other like incident appears on Respondent's video tapes of the picketing, he fabricated his testimony about an injury to his right shoulder. These conclusions must be correct as, given Khan's position at the time the pickup truck passed by him, injury to his *right* shoulder was impossible and as video tape of his picketing on subsequent days shows him moving his right arm without an indication of pain or discomfort.

[27] During direct examination, Kee asserted that he was able to observe rocks in the hands of Khan and Arista (''I seen the rocks in their hands''). However, during cross-examination, he said he was unable to see what was in their hands. Rather, ''I seen the rock as it was airborne.''

rendering any observations at a distance of 50 yards ''blurry'' at best, and cars were parked along the opposite side of Church Street and in the driveway of the Happy Valley Inn, resulting in only individuals' heads being visible from inside the guard shack. Also the people ''were all bunched together,'' making individual identification impossible. In these circumstances, including Shaw's observation that the rock throwers were in the midst of the gathered crowd of strikers and their supporters and not standing apart while throwing anything, I place no reliance on Kee's claimed eye witness identification and believe that he could not have identified any perpetrator that day and that, in order to justify punishment for the misconduct, he (Kee) fabricated his identification of the rock throwers, choosing the names of strikers, who had previously been pointed out to him by Sam Franco, and blaming them for the misconduct. However, notwithstanding the foregoing, I cannot find that neither Khan nor Arista participated in the rock throwing. In so concluding, I rely on the fact that both apparently were present at the time of the incident and on my belief that each alleged discriminatee as untruthful when he denied participation. As to Mohammed Khan, his denial was predicated on his injured right shoulder and resulting inability to raise his right arm in a throwing motion without enduring severe pain. Given what I perceive to be the sham nature of the injury, Khan's denial of participation can be given no credence. With regard to Arista, I note that, by all accounts, the rock-throwing barrage occurred between 4 and 4:30 p.m. and that he admitted being present across the street from the plant until 4:30. Given what I perceive as a likelihood that Arista would fabricate in order to achieve a desired result and the utter lack of a credible corroborative testimony as to his nonparticipation in the rockthrowing, Arista's denial of being involved must be viewed with skepticism. Accordingly, as with Khan, I cannot find that the General Counsel has met its burden of proof that Arista, in fact, was not guilty of the attributed misconduct.

Based on the record as a whole, the conclusion is warranted that Respondent has established that it had an ''honest belief'' that Mohammed Khan and Isaac Arista participated in the rockthrowing incident on October 26. The further conclusion is warranted that the General Counsel has failed to establish that neither discriminatee, in fact, engaged in the asserted misconduct. Moreover, the Board has held that rockthrowing, in the presence of other strikers, tends to coerce the innocent striking employees and justifies adverse consequences, including discharge. *Clougherty Packing Co.*, 292 NLRB 1139 (1989); *PBA Inc.*, 270 NLRB 998 (1984); *Hotel Holiday Inn*, 265 NLRB 1513 (198). In light of the foregoing, the General Counsel has not proven that the discharge of Khan and Arista were violative of Section 8(a)(1) and (3) of the Act, and I shall recommend dismissal of the complaint allegations, involving them.

2. Salas

My determination as to the legality of the October 28 discharge of Salvador Salas is governed by the traditional precepts of Board law in 8(a)(1) and (3) discharge cases, as modified by the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 453 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, in order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish (1) that the alleged discriminatees engaged in union activities; (2) that the employer had knowledge of such; (3) that the employer's actions were motivated by union animus; and (4) that the discharge had the effect of encouraging or discouraging membership in a labor organization. *WMUR-TV*, 253 NLRB 697, 703 (1980). Further, the General Counsel has the burden of proving the aforementioned by a preponderance of the evidence. *Gonic Mfg. Co.*, 141 NLRB 201, 209 (1963). While the aforementioned analysis was easily applied in cases in which the employer's motivation was straightforward, conceptual problems arose in 20 cases in which the record evidence disclosed the presence of both a lawful cause and an unlawful cause for the discharge. In order to resolve this ambiguity, in *Wright Line*, supra, the Board established the following causation test in all 8(a)(1 and (3) cases involving employer motivation. ''First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.'' Id. at 1089. Two points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a prima facie violation of the Act, the Board will not ''quantitatively analyze'' the effect of the unlawful motive. The existence of such is sufficient to make a discharge a violation of the Act. Id. at 1089 fn. 14. Second, pretextual discharge cases should be viewed as those in which ''the defense of business justification is wholly without merit'' (id. at 1084 fn. 5), and the ''burden shifting'' analysis of *Wright Line* need not be utilized. *Arthur Young & Co.*, 291 NLRB 39 (1988).

As with the other alleged discriminatees, analysis of the complaint allegations involving Salvador Salas depends on my resolution of the credibility of the witnesses and, in this regard, I fully credit the testimony of Supervisors Malcolm Messer and Merle Davidson and employee Reuben Moreno. Each of the individuals impressed me as being an honest and forthright witness and as truthfully testifying to what occurred. Likewise, Sam Franco, as the personnel and safely supervisor, appeared to be testifying in a candid manner, and he shall be credited with regard to his version of the instant events. Finally, in contrast to the above witnesses, neither alleged discriminatee Salas nor Michael Rogge, the plant manager, exhibited the testimonial demeanor of an honest witness. Salas seemed to be testifying in a contrived manner calculated to enhance the complaint allegations in his regard, and Rogge's demeanor was that of the quintessential disingenuous witness. Accordingly, each shall be credited only when his testimony specifically corroborated by that of the above more credible witnesses. However, while neither appeared to be at all candid, as between themselves, I found Salas to have been the more reliable and shall credit him whenever his testimony and that of Rogge are in conflict.

Based on the foregoing, and the record as a whole, I find that, on arriving at the plant on October 28 and discovering the debris in the loading dock area, resulting from the rock, bottle, and egg throwing 2 days earlier, Plant Manager Rogge became upset and was determined to punish the Union, which he blamed for the rock and bottle throwing, by assign-

ing the cleanup work to union officers who were working that morning. That this finding is justified, indeed, mandated, can best be seen from the facts that Rogge bypassed Merle Davidson in assigning the work to Salas when such work is normally performed by janitors under the latter's supervision and he had employees available to do the sweeping; that the work clearly was not a desirable task and perhaps, in Davidson's view, ''shitty''; that Rogge initially attempted to assign the sweeping to a member of the union's negotiating committee, Bill DeSersa, who occupied a skilled position at the plant; that, when he learned DeSersa was ill, Rogge immediately selected Union Shop Steward Salas to do the sweeping, without consulting with his Supervisor Messer, and ordered the latter to have Salas report to Davidson; and that removing the alleged discriminatee from the powerhouse resulted in disruption in the work assignments in that understaffed department. In this regard, I specifically do not credit Rogge's insistence that he was unaware of Salas' status as steward at the time.[28] Further, I find that, when Salas reported to Davidson, nothing was asked or said about a lunchbreak and that, either mistakenly believing he would be able to take his lunchbreak at his accustomed eating time or deliberately violating Respondent's policy that temporarily assigned employees take lunch at the same time as employees of the department to which the are assigned,[29] Salas left the plant at approximately 11 a.m. and went across the street to the Happy Valley Inn for lunch. Subsequently, after returning to the plant a half hour later and unwillingly accompanying Sam Franco to Rogge's office, Salas had what must be characterized as a disciplinary interview with the plant manager during which Salas told Rogge that he was a shop steward and that he had gone across the street in order to eat lunch. Also, in response to Rogge's comment that, as a fireman, he did not have a scheduled lunchbreak, Salas responded that he was entitled to a lunchbreak ''as long as I'm working in a labor pool.'' Finally, notwithstanding Salas' explanation for leaving the plant at 11 that morning, Rogge abruptly informed Salas that he was terminated for ''walking off the job'' without permission.

The foregoing factual findings are, I believe, sufficient to establish a prima facie violation of Section 8(a)(1) and (3) of the Act as to the discharge of Salvador Salas. Thus, the termination occurred the day after the conclusion of a 5-day work stoppage, a source of labor unrest which had been exacerbated by a rock and bottle barrage aimed at the loading dock area during the last day of picketing. The record establishes that Salas participated in the protected concerted activity and that he was a union steward at the inception of the strike, a fact known to Respondent. Moreover, as stated above, on October 28 when he observed the debris, which resulted from the above rock and bottle barrage, Plant Manager Rogge decided to punish the Union for this misconduct by assigning the onerous task of cleaning up the mess to union officials who were at work that morning. As argued by counsel, it is rather ''improbable'' that Respondent ''randomly'' selected two employees, who just happened to be union officials, for the job while bypassing janitorial employees who were available for selection. The more plausible explanation is that Respondent meant to harass union officials for what had occurred on October 26. Further, there exists ample justification for believing that what resulted in the termination was a ''misunderstanding'' rather than an act of insubordination meriting discipline. Accordingly, there exists sufficient record evidence that Respondent was unlawfully motivated when it terminated Salas.

At this point, pursuant to *Wright Line*, supra, the burden shifted to Respondent to establish that, even absent the existence of the aforementioned unlawful animus, it nevertheless, would have discharged the alleged discriminatee Salas. In this regard, Respondent argues that it terminated Salas for walking off the job at 11 a.m. on October 28 without permission and that its conclusion that he had engaged in the asserted misconduct was a logical inference based on what occurred. Indeed, given the facts that Salas abruptly stopped working and went across the street to the Happy Valley Inn and that he did so without authorization and at a time when the employees in the department, to which he had been assigned, remained at work, one might cursorily conclude, as did Respondent, that Salas had, in fact, walked off the job. However, more than superficial analysis would have established that a more likely explanation existed. Thus, by the time he stopped working, the alleged discriminatee had virtually completed the onerous sweeping job which he had been given and he had done so willingly, without complaint. Also, he returned to the plant approximately a half hour after leaving—a fact consistent with the length of employee lunchbreaks. Further, Rogge was aware that Salas had been at the Happy Valley Inn, a popular lunch location for plant employees. Moreover, on returning to the plant and rather than acting in the insolent manner one would expect of an employee who walked off a job, Salas resumed his sweeping duties. Finally, while, as Rogge discovered, powerhouse firemen did not receive regularly scheduled lunchbreaks, an in-depth investigation surely would have revealed that firemen and other powerhouse employees, such as Salas, customarily eat their lunches at 11 a.m. Utterly without regard to what close scrutiny of the facts would have revealed, Respondent acted on its spectral and unreasoned assumption and decided to terminate the alleged discriminatee.

Rather than merely being negligent and hasty, the portrait emerges of an employer consumed by unlawful animus against the Union because of the strike, determined to punish the union leadership for the damage resulting from the wanton rock and bottle barrage of 2 days earlier, and, in the words of counsel for the General Counsel, ''predisposed to finding fault with Salas' behavior.'' Put another way, my perception is that Respondent would not have acted against the alleged discriminatee, as it did, absent its unlawful animus. That my belief is accurate may best be seen from Plant Manager Rogge's behavior on hearing Salas' explanation for his behavior that morning. Thus, without considering what Salas said—or how it fit a more reasoned view of the facts—or consulting with Sam Franco who was present and listening, Rogge blurted out that Salas had engaged in serious misconduct[30] and would be terminated. Finally, even assuming

[28] Rogge admitted that he knew Salas had been a union steward in the past, and Salas stated that he had filed no fewer than 25 employee grievances.

[29] I believe that Salas fabricated his testimony regarding his discussion of an 11 a.m. lunchbreak with Davidson in order to excuse his clear misfeasance in taking lunch when he did on October 8.

[30] It would appear that, at most, Salas may have taken an unauthorized lunchbreak. While such may have warranted discipline, I do not believe his conduct rose to the level of walking off the job. In so concluding, I do not disagree with a disciplinary determination which is certainly within Respond-

that, as Franco testified, Rogge did not believe what Salas said, one may doubt the punishment inflicted absent unlawful animus. In this regard, I note that, prior to this incident, no long-time employee had ever been terminated for similar misconduct.

In view of what I perceive as Respondent's demonstrable animus toward the Union's leadership, I am convinced that the termination of Salvador Salas resulted from his position as a shop steward and not from any business considerations or asserted misconduct and that, therefore, he was terminated by Respondent in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. By terminating employee Salvador Salas because of his union activities, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

3. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(l) and (3) of the Act, I will recommend that Respondent be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged employee Salvador Salas, I recommend that the Respondent be ordered to offer immediate reinstatement to his former job or, if such job no longer exists, to a substantially equivalent job, without loss of seniority or any other rights or privileges, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[31]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, Gold Bond Building Products, a Division of National Gypsum Company, Stockton, California, its officers, agents, successors,[33] and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engaged in union or other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer reinstatement to Salvador Salas to his former position or, if that job no longer exists, to a substantially equivalent position of employment and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section above.

(b) Remove from its files any reference to the October 28, 1988 termination of Salas and notify him, in writing, that this has been done and that evidence of his discharge will not be used as a basis for any future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the Stockton plant, copies of the attached notice marked ''Appendix.''[34] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

ITS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that Respondent violated Section 8(a)(1) and (3) of the Act by terminating employees Mohammed Khan and Isaac Arista.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees because they have engaged in union or other protected concerted activities.

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ent's province to make. Rather, I find that Respondent's conduct was based on unlawful considerations and, hence, unlawful.

[31] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set forth in the 1986 amendment to 6 U.S.C. § 6621.

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[33] The record establishes that the Newark Sierra Company purchased the Stockton plant from Respondent in August 1989; however, there is no record evidence as to whether Newark Sierra Company is a successor to Respondent or whether it took over Respondent's business operations with knowledge of the latter's potential unfair labor practice liability. These matters may be litigated at the compliance stage and, until such are settled, my recommended Order only applies to the Respondent.

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer reinstatement to Salvador Salas to his former position or, if that job no longer exists, to a substantially equivalent position of employment and WE WILL make him whole for for any loss of earnings and other benefits suffered as result of the discrimination against him.

GOLD BOND BUILDING PRODUCTS, A DIVISION OF NATIONAL GYPSUM COMPANY